Supreme Court, U.S.
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85-249

No. .....

In The
Supreme Court of the United States
October Term, 1985

—o—

CITY OF LITTLE ROCK,

Petitioner,

vs.

DEBBIE WILLIAMS,

Respondent.

—o—

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

PETITION FOR WRIT OF CERTIORARI

—o—

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QUESTION PRESENTED

Whether a single isolated unconstitutional firing of a court clerk by a municipal judge possessing authority to hire and fire his employees establishes an official policy, custom or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. § 1983.

LIST OF PARTIES

The parties to this case are as follows:

William Butler, Defendant

City of Little Rock Third Party Defendant/Appellant/Cross Appellee/Petitioner

Linda Stanley, Plaintiff/Appellee/Cross Appellant/Respondent

Debbie Williams, Plaintiff/Appellee/Cross Appellant/Respondent

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

Whether A Single Isolated Unconstitutional Firing Of A Court Clerk By A Municipal Judge Possessing Authority To Hire And Fire His Employees Establishes An Official Policy, Custom Or Practice Of A Municipality Sufficient To Render The Municipality Liable For Damages Under 42 U.S.C. § 1983?

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT:

This Court Should Grant The Writ And Use This Case To Resolve A Conflict Among the Circuits And To Definitively Set The Parameters Of Municipal Liability Pursuant To 42 U.S.C. § 1983 For The Isolated Unconstitutional Acts Of Municipal Officials. 4

CONCLUSION 10

APPENDIX A (District Court Order) ..... App. 1

APPENDIX B (Eighth Circuit panel opinion) ..... App. 9

APPENDIX C (Eighth Circuit *En Banc Order*) ..... App. 36

TABLE OF AUTHORITIES

CASES: Page

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 8

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) 6, 9

Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984) 6

Bennett v. City of Slidell, 735 F.2d 762 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3476 (1985) 7

Berry v. McLemore, 670 F.2d 30 (5th Cir. 1982) 8

City of Oklahoma City v. Tuttle, 105 S.Ct. 2427 (1985) 6, 8, 9, 10

Dick v. Wantowan County, 738 F.2d 939 (8th Cir. 1984) 8

Losch v. Borough of Parkseburg, 736 F.2d 903 (3rd Cir. 1984) 6

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) 4, 5, 6, 7, 8, 9, 10, 11

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 3

Milligan v. City of Newport News, 743 F.2d 227 (4th Cir. 1984) 7

Perry v. Larson, 599 F.Supp. 727 (E.D.Wis. 1977) 6, 9

Polk County v. Dodson, 454 U.S. 312 (1981) 6

Rymer v. Davis, 754 F.2d 198 (6th Cir. 1985) 9

Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983) 7

Williams v. Butler, 746 F.2d 431 (8th Cir. 1984) 1, 3, 5, 6, 8, 9

Williams v. Butler, 762 F.2d 73 (8th Cir. 1985) (en banc) 1, 4

STATUTES:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1343(3) 3

TABLE OF AUTHORITIES—Continued

Page

42 U.S.C. § 1983 ..... 1, 3, 4, 5, 9, 10

42 U.S.C. § 1988 3

S.Ct.R. 17.1(a) 1, 10

MISCELLANEOUS:

Note, Municipal Liability Under Section 1983—Williams v. Butler, 18 Creighton L.Rev. 1267 (1985) 9

Schnapper, Civil Rights Litigation After Monell, 79 Colum. L.Rev. 212 (1979) 9

OPINIONS BELOW

The District Court did not issue an opinion in this matter. A copy of the judgment is included in the Appendix. The panel decision of the United States Court of Appeals is also included in the Appendix. *Williams v. Butler*, 746 F.2d 431 (8th Cir. 1984). The Court divided evenly on rehearing *en banc*, so no additional opinion was rendered. A copy of the May 13, 1985, order affirming the District Court is included in the Appendix. *Williams v. Butler*, 762 F.2d 73 (8th Cir. 1985).

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JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1984. A timely petition for rehearing *en banc* was granted and the case was argued on April 29, 1985. On May 13, 1985, the Court entered its order affirming the District Court judgment by a divided vote. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner believes that this Court should grant certiorari to review a federal appeals court decision that is in conflict with other federal courts of appeal on the same matter. S.Ct.R. 17.1(a).

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

> . . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

———o———

STATEMENT OF THE CASE

Debbie Williams (hereafter "Williams") was a secretary and court clerk to the Little Rock Municipal Court. William R. Butler (hereafter "Butler") was one of two duly elected municipal judges in Little Rock. Linda Stanley (hereafter "Stanley"), who is no longer a party to this action, was also a municipal court clerk.

In 1981 the Little Rock police began an investigation of missing traffic tickets. At some point the investigation focused on Butler as a possible suspect. During that period of time, Williams gave a statement to the Little Rock Police Department. She also testified before a county grand jury. Shortly after the grand jury testimony, Butler terminated her.

Stanley also testified before the grand jury. However, she was never terminated. She left her job with the municipal court alleging that other employees were mistreating her.

An action was filed in the United States District Court for the Eastern District of Arkansas alleging that Butler had violated Williams and Stanley's first amendment rights. Jurisdiction of the District Court was prop-

erly invoked pursuant to 28 U.S.C. § 1343(3), and remedies were sought pursuant to 42 U.S.C. § 1983. Williams and Stanley sued Butler in his official capacity only.

Butler later cross claimed against the City of Little Rock (hereafter "City") alleging that the City should pay any judgment imposed against him. The City denied any liability and defended Williams' action by contending that Butler's decision to fire her was a discretionary act on his part and was not a policy, custom or practice of the City.

The matter proceeded to jury trial. Before the issues were submitted to the jury the District Court held the City, over its objections, liable for any damages that may be assessed against Butler.

The jury returned a verdict in favor of Williams for $40,000.00 in compensatory damages, and $60,000.00 in punitive damages. The District Court set aside the punitive damage award pursuant to this Court's decision in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The District Court also awarded Williams attorneys fees pursuant to 42 U.S.C. § 1988. The jury returned a verdict in favor of Butler on the claims raised by Stanley.

The City appealed the District Court's ruling that it was *per se* liable for Butler's misconduct. Williams appealed the setting aside of the punitive damage award. Butler and Stanley did not participate in the appeal.

On appeal a panel of the United States Court of Appeals for the Eighth Circuit affirmed the District Court by a 2-1 vote. *Williams v. Butler*, 746 F.2d 431 (1984). The City sought rehearing *en banc*. After rehearing, the Court affirmed the District Court judgment because of

an equally divided panel. *Williams v. Butler,* 762 F.2d 73 (8th Cir. 1985).

The panel held that the City had delegated final authority to Butler to hire and fire employees in the municipal court. Hence, any acts of Butler's were held to be the policies of the City pursuant to *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978). Since a judgment was returned against Butler in his official capacity, the City was liable for that judgment, plus costs and attorney's fees. The City had contended that even if Butler were the final authority, *Monell* would not be a basis for liability since Butler's one aberrant act did not establish a policy, custom, or practice on which City liability could be based.

On June 12, 1985, the Eighth Circuit stayed the mandate pending the outcome of this petition.

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REASON FOR GRANTING THE WRIT

This Court Should Grant The Writ And Use This Case To Resolve A Conflict Among The Circuits, And To Definitively Set The Parameters Of Municipal Liability Pursuant To 42 U.S.C. § 1983 For The Isolated Unconstitutional Acts Of Municipal Officials.

The law in the area of municipal liability is unclear. The Circuits are in conflict on how to resolve the issue of municipal liability under a "policy, custom, or practice," theory. Litigants in federal district courts of one Circuit are being denied recovery as a matter of law, while

litigants in another Circuit with identical claims are having verdicts upheld on appeal. The federal judicial system needs guidance.

It is clear that a municipality can be held liable for some constitutional torts. *Monell v. Department of Social Services,* 436 U.S. 658 (1978). What is unclear is what type of act, committed with what degree of frequency, by what status of city official, subjects a municipality to liability for that act? The question presented by this case is, Whether a single, isolated unconstitutional firing of a court clerk by a municipal judge possessing authority to hire and fire his employees establishes an official policy, custom or practice sufficient to render the municipality liable for damages under 42 U.S.C. § 1983?

In this case Debbie Williams was fired by Little Rock Municipal Judge William R. Butler because she testified against him in a grand jury proceeding. There is no doubt that Butler violated her first amendment rights. But, this one aberrant act does not establish a "policy, custom, or practice," that should subject the City of Little Rock to liability. *Monell,* 436 U.S. at 690.

Williams has successfully argued that Butler was granted policymaking authority by the City of Little Rock to make personnel decisions. Yet, the action of firing Williams was not a result of any policymaking authority; rather, it was an aberrant, discretionary act carried out for Butler's personal reasons that in no way can be said to represent City policy, custom or practice.

The Eighth Circuit has held that all decisions made by policymakers, if they result in a constitutional tort, subject the municipality to liability. *Williams v. Butler,*

746 F.2d 431 (1984). In the Seventh Circuit, however, the *Williams* reasoning has been expressly rejected. *Perry v. Larson,* 599 F.Supp. (E.D.Wis. 1977); *see also, Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir. 1984).

This case does not involve a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality. *Monell,* 436 U.S. at 694; *Bennett v. City of Slidell,* 735 F.2d 762 (5th Cir. 1984), *cert. denied,* 105 S.Ct. 3476 (1985). It focuses on the second aspect of municipal liability discussed in *Monell,* i.e., whether the delegation of authority to a city official is the moving force behind a constitutional tort? *Monell; Polk County v. Dodd,* 454 U.S. 312, 326 (1981).

The Court has recently stated that

> . . . some limitations must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter . . . . at the very least there must be an affirmative link between the policy and the particular constitutional violation alleged. *City of Oklahoma City v. Tuttle,* 105 S.Ct. at 2436.

The various Circuits, though, are not placing these kinds of limits on municipal liability. In the context of this case, the Circuits are in particular disagreement when there is a single, isolated act of constitutional misconduct.

In the Third Circuit, for example, the Court has refused to find liability on the basis of a single, isolated incident, even when committed by a policymaking official. In *Losch v. Borough of Parkesburg,* 736 F.2d 903 (1984), a claim was made that the police chief was responsible for arresting a citizen without probable cause. The plaintiff theorized that since the police chief possessed final author-

ity for determining arrest procedures, then a false arrest made at the chief's direction was the affirmative link that would make the city liable. In rejecting this reasoning, the Court held that a municipal policy, as that term is used in *Monell*, cannot be inferred from a single instance of illegality. 736 F.2d at 903.

Likewise, the Fourth Circuit has refused to hold a municipality liable for the inadequate training of officers by its police chief on the basis of a single instance of alleged police brutality. *Wellington v. Daniels*, 717 F.2d 932 (4th Cir. 1983). Even if the police chief was the final authority for training police, the affirmative link needed to tie the policy with the unconstitutional act was missing when there was only one allegation of misconduct. *Accord, Milligan v. City of Newport News*, 743 F.2d 227 (4th Cir. 1984).

The most extensive analysis of this issue, perhaps, has come from the Fifth Circuit. *Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984), *clarified*, 735 F.2d 762. In *Bennett* the question was whether the City could be held liable for the misconduct of its City Attorney, and an inspector, in unnecessarily delaying the issuance of permits to a business. The plaintiff had complied with various City ordinances for businesses, but was continually harrassed by the City Attorney, and was faced with lengthy delays in opening his business. The Fifth Circuit *en banc* held that the City was not liable for these actions.

In its analysis, the Court first established that there was nothing facially unconstitutional about the City ordinances, or the procedures that were used to apply the ordinances. Nor was there anything unconstitutional about the discretion left to the City Attorney and building in-

spector concerning the issuance of permits. Hence, the first *Monell* test for municipal liability was not applicable.

The Court then questioned if there were a policy, custom, or practice theory of liability. Based upon this single act, the Court refused to find a policy that could subject the City to liability. The Court also held that "policy, practice or custom," connoted a persistent, widespread practice. *Accord, Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Tuttle*, 105 S.Ct. at 2436.

Finally, the Court concluded that if the delegation of policymaking to a final authority were facially constitutional, then a single discretionary act by that delegee, even if it resulted in a constitutional tort, would not subject the municipality to liability. In a subsequent *per curiam* opinion clarifying this holding, the Court articulated its position in this manner

> Official policy is . . . A persistent, widespread practice of city officials or employees, which although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents official policy. *Bennett*, 735 F.2d at 762.

In short, one act does not a custom make. Or, as Judge McMillian agreed in his dissent in *Williams*, not every discretionary act taken by an official to whom the City has given authority renders the City potentially liable, especially where that act is "aberrant or personally motivated." *Williams*, 746 F.2d at 444 (McMillian, J. dissenting). (This dissent comports with a prior Eighth Circuit panel opinion. *Dick v. Wantowan County*, 738 F.2d 939 (1984)).

The Fifth Circuit *en banc* opinion was in accord with its prior panel decisions. *See Berry v. McLemore*, 670

F.2d 30 (5th Cir. 1982) (City not liable for actions of police chief in using excessive force during arrest, even though police chief was final authority for arrest policy).

The Sixth Circuit rejects this reasoning. *Rymer v. Davis*, 754 F.2d 198 (1985). In finding a municipality subject to § 1983 liability in a police brutality case, the Court first found that the police chief set arrest policy for the municipality. Hence, since he was the final authority for arrest policy, the police were given "carte blanche" authority on how to carry out arrests. The Court used the *Williams* opinion as its rationale. Thus, the Sixth and Seventh Circuits are in direct conflict over the *Williams* rationale. *Perry, supra, Bell, supra.*

Of course, the parameters of this "final authority," basis of liability have not been set by this Court. Rather, these parameters are being based upon a law review article that appeared after this Court's decision in *Monell.* Schnapper, *Civil Rights Litigation After Monell*, 79 Colum. L.Rev. 212 (1979). Judge McMillan, in his *Williams* dissent, also doubted the wisdom of interpreting federal statutes according to a law review article as opposed to independent judicial analysis. *Williams*, 746 F.2d at 444, n.2; *see also*, Note, *Municipal Liability Under Section 1983: Williams v. Butler*, 18 Creighton L.Rev. 1267 (1985).

Clearly, then, there is definite conflict among the Circuits as to the parameters of municipal liability under *Monell.* This Court should grant this petition and use this case as the vehicle to definitively set the contours of munipical liability it identified in *Monell.* As Justice Rhenquist noted in *Tuttle,*

> Subsequent decisions of this Court have added little to the *Monell* Court's formulation [of the full contours of municipal liability] beyond reaffirming that the municipal policy must be the 'moving force of the constitutional violation' . . . [Explanation added] *Tuttle,* 105 S.Ct. at 2434.

It is an important case of federal statutory interpretation; it is an important issue which needs uniform interpretation by the federal appeals courts. S. Ct. R. 17.1(a).

While the Eighth Circuit has not considered this issue in light of *Tuttle,* the City still believes that this petition should be granted and decided after argument and briefs. The opinion in *Tuttle* ostensibly only dealt with lower level municipal employees. This case squarely addresses municipal liability for the acts of policymakers.

While the City believes that the District Court and the Eighth Circuit decided this case wrongly, that is insignificant when compared to the confusion that is occurring within the federal judiciary on this issue. Obviously, help is now needed that only this Court can provide.

CONCLUSION

On its face this case questions whether a municipality can be held liable for one aberrant discretionary act of a city official. Yet, the case really questions the parameters of municipal liability under 42 U.S.C. § 1983 and asks the Court to outline the full contours of municipal liability. The Court should answer the question left open in *Monell.*

The Circuits are in disagreement about the exposure of municipalities to liability for the acts of policymakers.

Specifically, the Circuits disagree on what constitutes a "policy, custom or practice," as those terms are used in *Monell*. This case presents a classic avenue for defining what constitutes the policymaking acts of a city official, for which liability can be imposed, as opposed to the discretionary acts of the policymaker, for which liability should not be imposed. The case also presents the vehicle for creating a unified definition of the terms "policy, custom, or practice."

Litigants in the Fourth, Fifth and Seventh Circuits are denied relief, while litigants with identical claims in the Sixth and Eighth Circuits are allowed to recover from municipalities, even for a single, isolated act. This Court should grant certiorari to resolve this conflict among the Circuits, and to bring uniformity in the interpretation of a federal statute.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

NO. LR C 81 633

DEBBIE WILLIAMS AND LINDA STANLEY
PLAINTIFFS

VS.

WILLIAM R. BUTLER, JUDGE, AND CHIEF ADMINISTRATIVE OFFICER OF THE LITTLE ROCK MUNICIPAL COURT—TRAFFIC DIVISION
DEFENDANT

WILLIAM R. BUTLER
THIRD PARTY PLAINTIFF

VS

CITY OF LITTLE ROCK
THIRD PARTY DEFENDANT

MEMORANDUM AND ORDER

(Filed on August 17, 1983)

On July 20, 1983, the jury returned verdicts in this case. A number of issues remained unresolved, however, and this memorandum constitutes the findings necessary to conclude the case.

The resolution of the issues is complicated by the puzzling positions taken by the City of Little Rock. Originally, the plaintiffs sued "William R. Butler, Judge and

Chief Administrative Officer of the Little Rock Municipal Court Traffic Division." Although claims were made against Judge Butler only in his official capacity, and never as an individual,[1] the City declined to assume the defense of the case or accept any responsibility for his actions.

Butler filed a motion for leave to file a third party complaint against the City contending that, inasmuch as the claim against him was for his actions in his official capacity and not as an individual, he should have judgment over against the City for any sums adjudged against him and the City should have to assume the defense of the case.

In response to the motion, the City, although not a party, filed a pleading on January 21, 1983, asking the Court to deny Butler's motion for leave to file the third party complaint. In that pleading, the City contended it could not be liable because if Butler acted as alleged in the complaint he was acting outside his authority in an *ultra vires* role for which the City was not responsible and, alternatively, if he was not guilty of the conduct alleged, there was no liability on the part of the City since Butler would have no liability. Furthermore, and even more interesting in light of later defenses raised by the City, the City said a defense of Butler by it posed a con-

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1. Although it is common to sue defendants "individually, and in their official capacity", the plaintiffs apparently elected to sue Butler only in his official capacity. The Court can only assume the decision was deliberate on the part of the plaintiffs since the fact that no claim was asserted against Butler individually was discussed at pretrial; the point is made in the pleadings; and, during the jury selection process, the omission of any claims against him individually was mentioned.

flict of interest problem because the plaintiffs and Butler were *all officers or employees of the City.*

When, however, the City filed an answer to Butler's third party complaint, it ignored its previous allegation that a potential conflict existed because all parties were employees of the City, and claimed that the plaintiffs were not employees of the City, but were "key staff or personal staff of defendant." The contention apparently has its foundation in the fact that the Arkansas legislature created the positions occupied by plaintiffs by state statute. *See, Ark. Stat. Ann.* § 22-704.1(44) (Supp. 1981). Further, the City denied that plaintiffs were "employees within the meaning of Title VII—Civil Rights Act of 1966, as amended" even though no claim was asserted under Title VII.

The City also "counterclaimed" against Butler seeking a declaratory judgment that plaintiffs were not employees of the City, but were, in fact, "personal staff of defendant Butler." In the alternative, and in the event plaintiffs were declared employees of the City, the City seeks a declaration that Butler must comply with the procedures of the City for hiring and terminating employees in the positions formerly occupied by plaintiffs.

At the conclusion of the evidence, the Court concluded that, as a matter of law, the plaintiffs were employees of the City when they occupied their jobs at the Little Rock Municipal Court; that Judge Butler was the duly elected Municipal Judge of the City and, at relevant times, was an elected official of the City; that Judge Butler acted in his "official capacity" and within the authority delegated to him by the City if he, in fact, terminated

plaintiffs; and that the City would be liable for any compensatory damages and equitable relief granted plaintiffs. Although the Court did not state the specific factual basis for the rulings on the record since it was a jury trial, the pending issues perhaps require some explanation of those rulings.

The City's claim that plaintiffs were not employees of the City apparently rests upon the fact that their positions were authorized by state statute and Judge Butler hired and terminated people who occupied those positions.[2] The fact that the positions were creatures of state statute is meaningless. Many city and county jobs are created by state statute and minimum and maximum salary levels established by state legislation. Nevertheless, the City and County employees are hired and fired by the local entity; they draw their paychecks from the local entity; and their work, conditions of employment and fringe benefits are controlled by the local entity. In this case, the undisputed facts are that plaintiffs were hired by Judge Butler, an official of the City; he controlled and supervised their work; they were paid by the City; they were processed through the City personnel office when they were hired; they were given City parking places; and they worked in the City owned Police and Courts Building. The authority to make employment decisions was given to Butler by the City personnel office when Butler took office a number of years ago. In any event,

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2. There is some question as to whether the City should be permitted to raise this issue in light of its initial claim that it should not be a party to the case because plaintiffs and defendant were *all* City employees and a conflict would exist if the City were a party.

the fact that Butler decides who is hired or fired does not change the status of that person from employee of the City to "key staff or personal staff employee" of Butler. The Court is not clear what significance that phrase has in any event, or what relevance Title VII might bear to the issue. In summary, plaintiffs were employees of the City, and there is no evidence from which an inference can reasonably be drawn to the contrary.

The Court need not reach the question presented by the City's request for a declaratory ruling that Judge Butler must comply with City personnel procedures in hiring and terminating employees. It is an issue which can be resolved by state law and, with respect to the issues in this case, is merely an advisory ruling.

Debbie Williams Claims

The jury returned a verdict in favor of Debbie Williams on her complaint and assessed her damages at $40,000 compensatory and $60,000 punitive. The jury also returned a verdict in favor of Williams on the counterclaim of Butler.

The first question is whether, in light of *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the award of $60,000 for punitive damages can stand against Butler and the City, since Butler was not sued as an individual, but only in his official capacity. The argument is made that the defendant waived any objection to punitive damages by failing to specifically object to the submission of the issue to the jury. The objection to the assessment of punitive damages was not waived by the defendant. The Court understood that both Butler and the City of

Little Rock consistently claimed they were not liable for damages, compensatory or punitive. The Court and the parties were aware of the *City of Newport* case, and it was mentioned as the jury instructions were assembled. The punitive damage issue was submitted to the jury solely because of the practice suggested in *Parker v. Seaboard Coastline Railroad*, 573 F.2d 1004 (8th Cir. 1978).[3] Furthermore, the plaintiffs in the *City of Newport* case relied upon a similar claim of waiver and the argument was rejected by the Supreme Court.

Since Butler was sued in his official capacity only (which is, in effect, a suit against the City), and any judgment will be paid from City funds, Debbie Williams is entitled to judgment for $40,000 in compensatory damages, but she is not entitled to judgment for punitive damages.

Debbie Williams also seeks the equitable remedy of reinstatement, or at least the option of reinstatement for a period of six months. Ordinarily, she would be entitled to reinstatement, but there are circumstances in this case which require denial of that equitable relief. First, Mrs. Williams was a member of a staff of five people who necessarily worked in close proximity with each other. It is inconceivable that Judge Butler or any of his remaining staff who testified at trial could co-exist with Mrs. Williams on a daily basis, much less conduct the business of the Municipal Court, if forced to work together. The

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3. There was sufficient evidence to submit the element of punitive damages to the jury. The issue was submitted to make the record complete and obviate the need for retrial in the event a judgment notwithstanding the verdict was entered and subsequently reversed.

jury awarded an ample amount of compensatory damages, and, obviously, never thought that Mrs. Williams would rejoin the Municipal Court staff. Perhaps more important, however, is the fact that in closing argument Mrs. Williams' attorney argued to the jury that her past loss of compensation would "continue in the future." Although future wage losses were not an element of damage, the argument was made as an extension of the back pay element.

The defendants made no objection to plaintiff's reference in argument to future disparity in the Clerk's pay rate and the amount Mrs. Williams is paid at her present job, and the Court did not, on its own initiative, call the jury's attention to the fact that future wage losses were not an element of damage. Under the circumstances, there is a reasonable basis for concluding the jury considered future losses in calculating Williams' compensatory damages. All things considered, the Court does not believe reinstatement is an appropriate remedy in this case.

Williams is, of course, entitled to recover a reasonable attorney's fee.

Linda Stanley

The jury returned a verdict for Butler on the complaint of Linda Stanley and in favor of Stanley on the counterclaim of Butler.

Stanley also requested the equitable remedy of reinstatement. Insofar as independent findings by the Court are necessitated by the claims for equitable relief, the Court agrees with the conclusions reached by the jury. The Court does not believe that Stanley established by a

preponderance of the evidence that she was "constructively discharged" because she exercised her First Amendment rights of free speech.

Judgment should be entered in favor of Butler on the complaint of Stanley and in favor of Stanley on the counterclaim of Butler.

Third Party Complaint Against the City

With respect to Butler's third party complaint, he seeks judgment over against the City for any sums adjudged against him. Since the judgment is against Butler in his official capacity only, it is perhaps merely an academic exercise to grant such relief. Nevertheless, for purposes of the record and the judgment in the case, Butler is granted judgment against the City for the sums awarded Debbie Williams.

Butler also claims that he is entitled to approximately $15,000 in attorneys' fees because the City refused to provide him with a defense to the complaint. Perhaps the City has a moral or practical obligation to defend its officials or employees who are sued for acts committed in their official capacities, but the Court is not aware of any legal obligation to provide such a defense. Since there is no legal or statutory basis for concluding that Butler is entitled to recover his attorneys' fees, the Court will follow the *American* rule and deny his claim for those sums.

Judgment shall be entered in accordance with these findings and conclusions.

Dated this August 17, 1983.

/s/ William R. Overton
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2534

No. 83-2641

Debbie Williams and Linda Stanley,

Plaintiffs/Appellees/
Cross-Appellants,

v.

William R. Butler,

Defendant,

v.

City of Little Rock, Arkansas,

Third-Party Defendant
Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Arkansas.

Submitted: June 11, 1984

Filed: October 15, 1984

Before BRIGHT, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

The defendant, the City of Little Rock (City), appeals from a jury verdict in favor of the prevailing plaintiff, Debbie Williams, awarding her compensatory damages under 42 U.S.C. § 1983 (1982), for a violation of her First Amendment rights by defendant Butler, a municipal judge. We affirm, but remand for a consideration by the district

court of the supplemental motion for costs and attorneys' fees submitted by the plaintiffs.

I. Facts

Butler was a duly elected municipal judge for the traffic court of the City of Little Rock. The plaintiffs in this action, Debbie Williams and Linda Stanley, were hired by Butler as clerks for his court. All three parties were employees of the City. Both of the plaintiffs, at different times, saw Butler deliberately destroy traffic tickets. Williams disclosed this event to the police. After Butler became aware that Williams had made a statement to the police, he fired her. Stanley was subpoenaed before a grand jury which was investigating possible corruption in the municipal traffic court, and she disclosed that she had seen Butler destroy traffic tickets. Stanley made two other appearances before the grand jury. Allegedly, after these appearances, Stanley was harassed by her co-workers to such an extent that she felt compelled to resign.

Both plaintiffs filed § 1983[1] actions against Butler in his official capacity.[2] Butler brought a third party com-

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[1]42 U.S.C. § 1983 (1982) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2]Suits brought against individual officers in their official capacities are, in effect, suits against the City. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 n. 55 (1978); *see also Hutto v. Finney*, 437 U.S. 678, 700 (1978).

plaint against the city, seeking judgment against the City for any sums adjudged against him. The jury returned a verdict in favor of Williams, awarding her $40,000.00 in compensatory damages and $60,000.00 in punitive damages. The jury returned a verdict in favor of Butler on Stanley's § 1983 claim, and the court found in favor of Butler on his third party complaint against the City. The district court awarded Williams attorney fees, but did so only after reducing the award by 25% to account for Stanley's complete failure to prevail on her claim. On the basis of *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the district court set aside the punitive damage award the jury had returned for Williams. The City is appealing the district court's finding in favor of Butler on his third party complaint, and Williams is appealing the dismissal of the punitive damage award and the reduction in the requested amount of attorney fees.

II. Discussion

A. The City's liability.

The City argues that it is not liable for the unconstitutional acts of its employee, Butler. It is not disputed that, by firing Williams, Butler violated Williams' First Amendment rights. Rather, the City argues that Butler's action was not taken pursuant to City policy, nor was Butler a city "official" for purposes of § 1983. We hold that, under our reading of *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978), the City is liable for Butler's unconstitutional act.

In *Monell*, the Supreme Court reversed, in part, its earlier decision in *Monroe v. Pape*, 365 U.S. 167 (1961), and held that local governments are not "wholly immune from suit under § 1983." *Monell*, 436 U.S. at 663. The Court held as follows:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person" by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision-making channels.

Id. at 690-91. However, the Court upheld the part of *Monroe* which held that a municipality will not be liable "solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 691. "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

Thus, under *Monell,* we need to address two questions in order to determine the City's liability in this case. First, we need to determine whether Butler's act of firing Williams implemented or executed a policy statement, ordinance, regulation, or decision adopted and promulgated by the City's governing body. If not, we need to decide whether his unconstitutional act was taken "*pursuant* to

governmental 'custom' even though such a custom" had not received formal approval through the City's official decisionmaking channels. *Id.* at 691 (emphasis added). In other words, we need to determine whether, in executing a City custom, Butler inflicted an injury of constitutional dimensions. *See id.* at 694.

As a threshold matter, we note that we must view the evidence in the light most favorable to Williams, the party for whom the jury returned its verdict. *Trace X Chem. Inc. v. Canadian Indus. Ltd.,* No. 83-1847, slip op. at 4 (8th Cir. June 29, 1984). At trial, Williams did not introduce any evidence of a formal policy statement, ordinance, regulation, or decision adopted and promulgated by the City's governing body. Thus, it is clear that Butler did not act pursuant to any of those modes of authority when he fired Williams.

Williams was the only party who introduced evidence regarding whether Butler acted pursuant to governmental custom when he fired Williams. Butler had been elected as a municipal court judge in 1969. He has served in that capacity for fifteen years. In 1969, according to his own testimony, Butler went to see the City's personnel director regarding how he was to go about getting a staff. The personnel director told him that traditionally the courts had been responsible for hiring and firing their own employees.

The district court found specifically that even though Butler's employees were processed through the City personnel office when they were hired, paid by the City, given City parking places, and worked in City buildings—Butler hired his own employees, and controlled and supervised their work. In other words, Butler was making employ-

ment decisions for the City. The district court also found that the City personnel office had given Butler authority to make employment decisions when he had assumed his office. There was no evidence to the contrary. Thus, we think it is clear that the City, by custom and practice for at least fifteen years, had established a policy of giving municipal judges *carte blanche* authority to make their own personnel decisions. It equally is clear that Butler acted pursuant to this policy when he fired Williams.

The determinative issue in this case is whether Butler's unconstitutional decision and act were sufficient to render the City liable under § 1983. In other words, we must determine whether Butler's unconstitutional act was within the meaning of the language used by the Supreme Court when it wrote: "... it is when *execution* of a government's policy or custom ... inflicts the injury that the government as an entity is responsible under § 1983." *Monell,* 436 U.S. at 694 (emphasis added). This precise issue is a difficult one, and appears to be a novel question in this circuit. The Fifth Circuit appears to have been the first circuit to address this question squarely and, indeed, it paved a path which several other circuits have chosen to follow.

In *Familias Unidas v. Briscoe,* 619 F.2d 391 (5th Cir. 1980), the Fifth Circuit considered the liability of a state and a school board for a county judge's enforcement of an unconstitutional state statute. Because the county judge drew his authority from the state, only the school board could be held liable for the judge's actions. *Id.* at 404. In the process of reaching this conclusion, the court considered under what circumstances a county official's actions could be said to represent "official policy" for pur-

poses of liability under § 1983. The court concluded that, at least in the areas in which a local governmental official, alone, is the "final authority or ultimate repository of . . . power," that official's "conduct and decisions must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy'" for purposes of § 1983.[3] *Id.* The Second,[4] Third,[5] Fourth,[6] Ninth,[7]

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[3]The Fifth Circuit has followed this holding in a variety of circumstances. *See, e.g., Hart v. Walker,* 720 F.2d 1436, 1445-46 (5th Cir. 1983), (county would be liable for a county supervisor's acts if supervisor was the final authority on the issue—remanded for a factual determination of final authority); *Bowen v. Watkins,* 669 F.2d 979, 989-90 (5th Cir. 1982) (notwithstanding an appeals process the plaintiff could have pursued, the city would be liable for a police chief's unconstitutional act if as a practical matter the chief was the final authority on the personnel determination in issue); *Schneider v. Atlanta,* 628 F.2d 915, 920 (5th Cir. 1980) (if director of the bureau of corrections had authority to make the final decision, the city would be liable for the director's unconstitutional act).

[4]*Rookard v. Health & Hosps. Corp.,* 710 F.2d 41, 45 (2d Cir. 1983) (court held the city liable for the unconstitutional discharge of employee by supervisors who had final authority on personnel decisions for the city's health and hospitals corporation).

[5]*Black v. Stephens,* 662 F.2d 181, 191 (3d Cir. 1981), *cert. denied,* 455 U.S. 1008 (1982) (court held the city liable for policy promulgated by police chief, which led to the filing of false charges by police officer against a citizen complainant).

[6]*Wellington v. Daniels,* 717 F.2d 932, 936, 937, 937 n.6 (4th Cir. 1983) (court held that, because he was the final authority on the subject, police chief's choice and implementation of practices and procedures reflected government "policy," but evidence was insufficient to establish that chief had encouraged a policy of police brutality).

[7]*McKinley v. Eloy,* 705 F.2d 1110, 1116-17 (9th Cir. 1983) (court held city liable for unconstitutional discharge of a police officer by city manager who had final authority on personnel decisions).

and Eleventh[8] Circuits have followed the lead of the Fifth Circuit and adopted this legal position. However, the Fifth Circuit recently reversed its position, at least as applied to non-personnel situations or third parties. In *Bennett v. Slidell*, 728 F.2d 762 (5th Cir. 1984) (*en banc*), the court held that for purposes of liability under § 1983, the local governing body itself must have acted unconstitutionally, or must have been directly responsible for the formal policy or custom pursuant to which the unconstitutional act was taken. *Id.* at 767. Further, unless a local governing body has expressly or impliedly appointed an official to act in its place, that body cannot be held responsible for the acts of that official. *Id.* at 769. Thus,

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[8]*Wilson v. Taylor*, 733 F.2d 1539, 1545-47 (11th Cir. 1984) (notwithstanding an appeals process plaintiff could have pursued, city was liable for police chief's unconstitutional discharge of police officer); *Berdin v. Duggan*, 701 F.2d 909, 914 (11th Cir.), *cert. denied*, — U.S. —, 104 S. Ct. 239 (1983) (city ordinance delegated final authority over city personnel decisions to mayor, so city was liable for mayor's unconstitutional discharge of city employee); *Williams v. Valdosta*, 689 F.2d 964, 969 (11th Cir. 1982) (although there was some dispute as to whether plaintiff was demoted by city ordinance or by city manager who had final authority over city personnel decisions, city was liable for plaintiff's unconstitutional demotion under either theory); *Hearn v. Gainesville*, 688 F.2d 1328, 1334-35 (11th Cir. 1982) (city not liable where final decision maker, city council, acted on false information supplied by personnel director who did not have final authority on personnel decisions).

even though, in *Bennett*, the acts taken by the city officials may have been unconstitutional, and even though those authorities were final authorities on the decisions in question, the city was not liable for those acts. *See id.* at 770.

In a dissenting opinion to *Bennett*, Judge Politz offered the following reflections on the majority's opinion:

> In essence, the majority holds that any action by an appointed official that is inconsistent with the city's written ordinance is an aberrant act attributable only to that official and, therefore, that such action can never constitute official policy within the meaning of *Monell*. This restrictive interpretation effectively negates the possibility that municipal liability will ever be imposed for the unconstitutional actions of an appointed official. Indeed, under the contours defined by the majority, the instances in which an edict or act of any person not a "lawmaker" may "fairly be said to represent official policy" will seldom arise. That result is totally at odds with *Monell's* mandate that municipalities be subjected to § 1983 liability for more than the mere written words of their ordinances.

Id. at 771 (Politz, J., dissenting). Although we might be inclined to agree with Judge Politz' reasoning, we need make no decision on the validity of *Bennett*, as that case applied to an apparent aberrant act by a city official against a third party. The case at bar deals with a City personnel decision made by a City official. However, in *Monell*, it is clear that the Supreme Court was concerned with more than the policies, including customs with the force of policy, promulgated formally by the rulemaking body of a local government, and concerned with more than the acts taken by a local governing body itself. *See Monell*, 436 U.S. at 685-86 n. 45, 691 n. 56. Indeed, the culprit for whom the city could be held liable in *Monell* was not the

local governing body of the city itself, but its department of social services and board of education which were making City personnel decisions in an unconstitutional manner. *Id.* at 660-61. Further, in *Monroe*, the landmark case in § 1983 jurisprudence and the case from which *Monell* draws its force, it is clear that the Court was concerned with unconstitutional acts taken by officials in spite, and in the face of constitutionally valid laws. *See generally, Monroe*, 365 U.S. at 171-80.

In a situation where the victim of an unconstitutional employment decision and act is afforded redress by a procedure established by a local governing body, which could correct the injustice, that a body can avoid liability for the unconstitutional acts of its officials—and the victims can be made whole. *See Owen v. City of Independence*, 445 U.S. 622, 652 (1980). Under this circumstance a city would not be delegating away its ultimate authority for city employment decisions, nor would a city be abdicating responsibility for those decisions. However, where, as here, there is no internal procedure of redress for the victim of an unconstitutional act because an official has been delegated final authority on an employment decision, the responsibility for which primarily lies with the City, a local governing body must be held responsible for the acts of its officials. *See generally*, R. Freilich & R. Carlisle, *Sword & Shield*, 435-37, 461-65 (1983) (Municipalities should expect that they will be strictly liable for adverse employment decisions, especially employee terminations).

As a practical matter, local governing bodies must delegate broad authority to their officials in order to keep their corporate bodies running smoothly. However, when, as here, officials are given final authority to make deci-

sions and to act pursuant to a city policy or custom, or in other words to be the officials vested with the ultimate responsibility for acting on behalf of the city, a city cannot be allowed to abdicate its responsibility for those decisions. Under the dissenting opinion's interpretation of the majority opinion in *Bennett*, any acts taken by these officials —regardless of their constitutionality, regardless of whether the act was taken or decision made on behalf of the City, and regardless of whether the officials had the final authority on an issue—could not be attributable to the governing body absent facially unconstitutional laws.[9] If this were the case, § 1983 and *Monell* would be meaningless.

Nor can we agree with the portion of *Bennett* that holds that governing bodies may be held liable only for the unconstitutional acts of its officials of which it has actual knowledge, or which are so persistent that constructive knowledge can be imputed to the governing bodies. *Bennett*, 728 F.2d at 768. The law cannot tolerate a situation where the constitutional rights of several people must be violated before an individual victim can seek justice.

Accordingly we hold that: (1) if, according to a policy or custom established by a governing body, an official is delegated the authority, either directly or indirectly, to

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[9]Yet the history of civil rights in this country is testimony to the reality that innocent victims often suffer discrimination at the hands of local officials who, for all practical purposes, are accountable to no one and who act in the face of constitutionally neutral laws that prohibit their conduct. Indeed, the Civil Rights Act of 1871 was passed in order to address the abuse of power by lower echelon officials. *Owen*, 445 U.S. at 650-51; *see generally, Monroe*, 365 U.S. at 171-80; *see generally Sword & Shield* at 23-28.

act on behalf of a governing body; and (2) if a decision made within the scope of the official's authority ends the matter, then the acts of the official may fairly be said to be those of the local governing body. Our holding is a narrow one. We are dealing here with an intentional, unconstitutional act taken for the City by a City official who was given final authority, pursuant to a custom established by the City through its personnel director, to make the decision which led to that act. We do not speculate beyond the precise factual situation in this case. We hold only that when a city official makes an ultimate employment decision on behalf of a city regarding a city employee, the city must be held responsible for the consequences of that decision. We wish to stress that we do not view the City's policy, of allowing municipal judges to make their own personnel decisions, as unconstitutional. The adoption of that policy clearly is within the province of the City's authority. What we take objection to is the unconstitutional act of a City employee who was, by City custom, the final arbiter on the matter.

While a city may not be held liable for the discretionary decisions of its officials, *it should be held responsible for the consequences of administrative decisions made for the city by those officials.*[10] The facts in this case estab-

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[10]The crux of the disagreement between the majority and dissenting opinions in this case can be described as follows. The dissent believes that "the focus must always be whether the injury-inflicting act was a city policy or custom . . . . The question is not whether Butler 'customarily' hired and fired his own staff, but whether the constitutional injury-inflicting act . . . was a city custom." *See infra* at 213, 213 n.1 (emphasis added). We believe, however, that when a local governing body has established a policy or custom of allowing certain of its

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lish unequivocally that, even though the City theoretically retained the primary responsibility for employment deci-

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officials to make administrative decisions—such as an employment decision—on behalf of the body, that the focus should be on the act taken pursuant to the policy, not on the policy. *See Monell,* 436 U.S. at 691 (" . . . local governments like every other § 1983 'person' . . . may be sued for constitutional deprivations visited *pursuant* to governmental custom . . . .") (emphasis added). When an official makes a discretionary decision, however, the appropriate focus may center around whether any given act itself is a policy. The distinction between the two decisions is a difficult one to articulate, but we are not totally without guidance.

In *Polk County v. Dodson,* 454 U.S. 312 (1981), the Supreme Court held that a county was not liable under § 1983 for the discretionary decisions made by county public defenders in the representation of clients because those decisions could not be characterized as county policy. *Id.* at 326. Thus, in order for a local governing body to be held liable for the discretionary acts of its employees, it may be that the unconstitutional act itself must be a policy of the body, as the dissent in this case maintains. *See infra* at 213, 213 n.1; *see also Dick v. Watonwan County,* No. 83-1633, slip op. at 5-7 (8th Cir. July 11, 1984). We have no quarrel with this position.

However, in *Polk County,* the Supreme Court drew a distinction between administrative decisions made by officials on behalf of their local governing bodies, and discretionary decisions made by those officials.

> In concluding that [a county public defender] did not act under color of state law in exercising her professional judgment in a criminal proceeding, we do not suggest that a public defender never acts in that role. In *Branti v. Finkle,* 445 U.S. 507 (1980) . . . we found that a public defender so acted when making hiring and firing decisions on behalf of the State. It may be . . . that a public defender would also act under color of state law while performing certain administrative functions.

454 U.S. at 324-25. We think the distinction between discretionary actions and administrative actions made on behalf of a local governing body is a crucial one. It is the determining factor which: supports a finding of liability in this case; distinguishes this case from the facts and holding in *Polk County;* and distinguishes this case from the facts and holding in the opinion of this court in *Watonwan County.*

sions, the City in fact had adopted a policy of delegating authority to the municipal judges to make certain final personnel decisions for the City. The City cannot be allowed now to escape responsibility for the consequences of an act taken pursuant to an established City policy. Butler, a municipal judge, fired Williams, a City employee, because she exercised her First Amendment rights. Under these circumstances, we hold that the City is liable for Butler's unconstitutional act.

B. The "final authority" issue.

At the close of Williams' case-in-chief, the City moved for a directed verdict which was denied by the trial court. The City characterizes this denial as error. The trial court went on to find that the City's personnel director had given Butler the final authority to make the personnel decisions for his court.[11] On appeal, the City argues that whether Butler was the final authority on personnel decisions in his court was a question of fact which should have been submitted to the jury. We disagree, and uphold the trial court's finding on this issue.

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[11]The trial court's memorandum states as follows:

> At the close of the evidence, the Court concluded that, as a matter of law . . . Judge Butler acted in his "official capacity" and within the authority delegated to him by the City if he, in fact, terminated plaintiff; and that the City would be liable for any compensatory damages and equitable relief granted plaintiffs . . .
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> . . . .
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> . . . In this case, the undisputed facts are that plaintiffs were hired by Judge Butler, an official of the City; he controlled and supervised their work . . . . The authority to make employment decisions was given to Butler by the City personnel office when Butler took office a number of years ago.

We need not tarry long with the City's first point. It is clear that a directed verdict is proper only when the evidence is such that reasonable people could not differ as to what the verdict should be. *Jackson v. Prudential Ins. Co.*, No. 83-1773, slip op. at 3 (8th Cir. May 31, 1984); *Rey v. Fredericktown*, 729 F.2d 1171, 1174 (8th Cir. 1984); *Crues v. KFC Corp.*, 729 F.2d 1145, 1148 (8th Cir. 1984). According to the City's brief, Williams and a witness for Williams both testified that they had been fired by Butler. Butler testified that, when he first took office in 1969, he had been given authority to hire and fire his staff by the city personnel director. There was *no* evidence to the contrary. Under these circumstances, the trial court was correct in denying the City's motion for a directed verdict.

These same circumstances lead us to conclude that the trial court also was correct in finding, as a matter of law, that Butler was the final authority on personnel decisions for his court. When the evidence on an issue leaves no room for any reasonable difference of opinion as to its resolution, the district court should resolve the issue as a matter of law. *Roesch, Inc. v. Star Cooler Corp.*, 712 F.2d 1235, 1237 (8th Cir.), *cert. denied*, — U.S. —, 104 S. Ct. 1707 (1983), *quoting, Admiral Theatre Corp. v. Douglas Theatre Corp.*, 585 F.2d 877, 883 (8th Cir. 1978); *see McGinn v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 83-1829, slip op. at 8 (8th Cir. June 22, 1984).

C. The tape recordings.

The City's Police Department was investigating the Traffic Division of the Little Rock Municipal Court in 1981. On two occasions, April 24 and May 11 of 1981, Ms. Judy Wright visited Butler's chambers and wore a body

microphone to record the conversations she had with Butler and court employees on these occasions. These conversations were received and recorded elsewhere by police officers. At trial, Williams introduced these tapes, and their accompanying transcripts, into evidence. Although the tape of the April 24th conversation, exhibit no. 2, and its accompanying transcript, exhibit no. 2a, were introduced into evidence, the tape was not played for the jury nor was the transcript read by the jury. Thus, the City could hardly have suffered prejudice as a result of the trial court's admission of these exhibits into evidence. Accordingly, we confine our consideration to the objections the City raises regarding the tapes and transcript of the May 11th conversation, exhibits nos. 1, 1a, and 5.

The May 11th taped conversation, exhibit no. 1, was monitored by Lt. Plummer, a police officer. At trial, Plummer testified that he had listened to this tape, had read its accompanying transcript, and that he believed they fairly and accurately reflected the conversation which took place. Wright testified that the transcript of the May 11th conversation accurately reflected who the speakers had been. Apparently, she was not asked any other questions regarding the accuracy or authenticity of either exhibit.[12] Exhibit no. 5 was a copy of exhibit no. 1, and it had been electronically processed to remove or reduce background noise. This exhibit is the tape which was played for the jury. Prior to trial, the City made a motion *in limine* to

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[12]The parties' briefs give differing accounts of the extent to which Wright verified the accuracy and authenticity of the May 11 tape and transcript, and neither party included the relevant parts of her testimony in the designated record on appeal. For purposes of argument, we assume that Wright failed to fully authenticate these exhibits.

exclude the tapes and transcripts from evidence. As to exhibits nos. 1, 1a, and 5, this motion was denied in its entirety subject to the condition that Williams provide a proper foundation for admitting the exhibits into evidence. On appeal, the City argues that Williams failed to provide a proper foundation for these exhibits, and thus they were admitted into evidence erroneously. We disagree.

As a threshold matter, we note that the admissibility of evidence is primarily a determination to be made by the trial court. We will not overturn such a determination except for a clear abuse of discretion. *United States v. Jones*, 687 F.2d 1265, 1267 (8th Cir. 1982), *quoting*, *United States v. Brown*, 482 F.2d 1226, 1228 (8th Cir. 1973). In *United States v. McMillan*, 508 F.2d 101 (8th Cir.), *cert. denied*, 421 U.S. 916 (1975), we set forth the requirements for introducing tape recordings into evidence. The proponent of the tapes must establish that: (1) the recording device was capable of taking the conversation offered into evidence; (2) the operator of the device was competent to operate the device; (3) the recording is authentic and correct; (4) changes, additions, or deletions have not been made; (5) the recording has been preserved in a manner that is shown to the court; (6) the speakers are identified, and (7) the conversation elicited was made voluntarily and in good faith, without any kind of inducement. *Id.* at 104. The City attacks the exhibits on all but the first and sixth of these requirements.

Because the quality of the recording was poor, the City asks us to conclude that the tape recorder operator did not competently record the conversation; thus, the second *McMillan* requirement is not met. However, the

fact that the tape recording successfully was *made* satisfies the competency requirement of the *McMillan* test. *United States v. McCowan*, 706 F.2d 863, 865 (8th Cir. 1983).

Second, the City argues that Williams failed to authenticate the exhibits. According to the City, the tapes were not authenticated because Wright testified only that the transcript of the tapes accurately reflected who the speakers were. However, Plummer, the officer who monitored this recording, testified that he had listened to the tape, read the transcript, and that both accurately reflected the conversation which took place. Along with Wright's identification of the speakers, this testimony was sufficient to establish the authenticity and accuracy of the tape, *United States v. Panas*, No. 83-1909, slip op. at 13 (8th Cir. June 29, 1984), as well as its accompanying transcript. *see United States v. Bentley*, 706 F.2d 1498, 1507 (8th Cir. 1982). While perhaps it would be preferable to have the person who prepared a transcript testify to its accuracy, *see United States v. Bentley*, 706 F.2d 1498, 1507 (8th Cir. 1983), *cert denied*, — U.S. —, 104 S. Ct. 2397 (1984); *McMillan*, 508 F.2d at 105, it is unnecessary where the accuracy of the transcript is not in dispute. Aside from the general allegations that the tape was inaudible, we note that the City has not pointed out any inaccuracies in the transcript which could have led to prejudice, *Bentley*, 706 F.2d at 1507-08; *Gordon*, 688 F.2d at 44, nor did the City offer its own version of the transcript at trial, a practice followed when the content of the conversation is in dispute. *United States v. Mendoza*, 574 F.2d 1373, 1378 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978), *citing United States v. Onori*, 535 F.2d 938, 948-49 (5th Cir. 1976).

Further, we note that the trial court cautioned the jury to base their verdict upon what was heard, not what was read. In addition, the trial court did not allow the jury to rely on the transcript during its deliberations. Under these circumstances, we cannot say that the admission of the transcripts was error.

Third, the City argues that Williams failed to meet the fourth requirement of the *McMillan* test—that changes, deletions, or additions had not been made—because the tape had been electronically processed in order to eliminate or reduce background noise. This contention is without merit. The engineer who processed the tape testified that no part of the tape had been deleted, and that only sound interference had been removed from the tape. Having satisfied the trial court, this testimony was sufficient to justify admitting the tape, exhibit no. 5, into evidence and to let it be heard by the jury. *Gordon,* 688 F.2d at 44.

Fourth, the City argues that Williams failed to establish an acceptable chain of custody for the exhibits. At trial, there was inconsistent testimony between police officers as to who had the original tapes, when, and where the tapes were kept. However, it is undisputed that the originals were in the custody of the police at all relevant times.

Trial courts are entitled to assume that public officials who had custody of evidence properly discharged their duties and did not tamper with the evidence. *Panas,* No. 83-1909, slip op. at 14, *McCowan,* 706 F.2d at 865; *United States v. Weeks,* 645 F.2d 658, 660 (8th Cir. 1981), *citing, United States v. Malone,* 558 F.2d 435, 438 (8th Cir. 1977). This assumption is operative until the defendant makes a minimum showing of "ill will, bad faith,

other evil motivation, or some evidence of tampering." *Jones,* 687 F.2d at 1267, *quoting, United States v. Lane,* 591 F.2d 961, 962 (D.C. Cir. 1979). Factors to be considered in a trial court's determination of the admissibility of evidence include the nature of the article, the circumstances surrounding its preservation and custody, and the likelihood that others have tampered with it. *Weeks,* 645 F.2d at 660; *Malone,* 558 F.2d at 438, *quoting, Brown,* 482 F.2d at 1228. The City did not make any showing that the evidence had been tampered with, and the police had the evidence in their custody at all relevant times. As to *McMillan's* fifth requirement, it was not error to allow the tapes and transcript into evidence.

Fifth, the City tenders a weak argument with respect to *McMillan's* voluntariness requirement. The City reasons that Wright may have so manipulated the conversation which was taped as to vitiate the voluntariness of the statements made by Butler and his employees. However, as the City concedes, there is no evidence that the parties to the conversation were under any type of duress, nor is there any evidence that Wright induced those parties to speak with her. Wright merely offered these parties an opportunity to expose their corrupt activities. *See McCowan,* 706 F.2d at 865. The parties to the conversations obviously spoke of their own free will.

Thus, all requirements of the *McMillan* test were satisfied by Williams. However, the City argues that the tape was so inaudible that it was error to allow the tape and transcript into evidence.

> The task of the trial court, in determining whether to admit tape recordings into evidence which contain inaudible portions, is to assess whether the unintel-

> ligible portions are "so substantial in view of the purpose for which the tapes are offered, as to render the recording as a whole untrustworthy."

United States v. Bell, 651 F.2d 1255, 1259 (8th Cir. 1981), *quoting, United States v. Young,* 488 F.2d 1211, 1214 (8th Cir. 1973). We have read the transcript of the tape to which the City objects. Although there are inaudible portions on the tape, they are not so substantial that they render the recording, as a whole, untrustworthy. The trial court did not abuse its discretion in admitting the tape and transcript of the May 11th conversation into evidence.

D. Improper closing remarks.

After trial, the City made a motion to modify the amount of the judgment because during closing argument, Williams' attorney improperly referred to the future monetary losses Williams would continue to suffer as a result of being fired. Future losses had not been pleaded as an element of damage in Williams' case. While we cannot condone an attempt to inject into the damages an element which neither has been pleaded nor proven, we note that the City failed to object to the remark.

This court has set forth the standard for reviewing an error which was not objected to at trial.

> Rule 46 of the Federal Rules of Civil Procedure retains the requirement that counsel make timely objection to the court. The Supreme Court, in *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 239 [1940], held that counsel, during closing argument, "cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." This court in *Thomp-*

> *son v. Boles,* 123 F.2d 487, 495-96 (8th Cir. 1941), *cert. denied,* 315 U.S. 804 [1942], adhered to the Supreme Court's ruling and held that . . . "[where an improper remark is made during closing argument], counsel may, and preferably should, make [the] objection, take [an] exception, or ask for remedial action at the close thereof and before the case is submitted to the jury." Only in extraordinary situations, in order to prevent a "plain miscarriage of justice," will a reviewing court reverse a judgment based upon errors not objected to at trial.

Lange v. Schulz, 627 F.2d 122, 127 (8th Cir. 1980), *see also Fed. R. Civ. P.* 61. By failing to object to the remark during closing argument, the City waived its right to object to the error on appeal.

E. Attorneys' fees.

Pursuant to the judgment, Williams' attorneys filed a motion for attorneys' fees in the amount of $19,250.00. The trial court reduced the amount requested for the work done by law clerks. The City argued that the award should be reduced because only one of the plaintiffs prevailed. The trial court found merit in this argument and, because it was impossible to distinguish between the time spent on the two claims, reduced the award by 25% for a final award of $13,338.30. After the original request for attorney fees had been filed, Williams' attorneys submitted a supplemental motion of costs and fees for $1,000.00, which allegedly reflected the time spent on post-trial motions. There is no indication, in the order awarding attorneys' fees, that the trial court considered this supplemental motion. On appeal, Williams objects to the court's reduction in fees and failure to consider the supplemental motion for fees. We affirm the trial court's award of

attorneys' fees, but remand for a consideration of the supplemental motion submitted by Williams' attorneys.

The award of attorney fees is a matter entrusted to the sound discretion of the trial court, and we will not reverse a ruling on the award of fees unless the record clearly indicates that the court has abused its discretion. *Hensley v. Eckerhart,* — U.S. —, —, 103 S. Ct. 1933, 1941 (1983); *Bowman v. Pulaski County Special Sch. Dist.,* 723 F.2d 640, 646 (8th Cir. 1983). It must be remembered that one of the plaintiffs in this case failed on her claim entirely, and that both plaintiffs were represented by the same attorneys.

In *Hensley* the Court noted that the most critical factor in determining a fee award is the level of success obtained by the prevailing party. *Hensley,* — U.S. at —, 103 S. Ct. at 1941. In reviewing which specific fee requests should be discounted from a total statement when a party has not prevailed on every claim, the "district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment." *Id.* We think this statement also applies to this situation, where only one of two plaintiffs represented by the same attorneys prevails. We think the district court's award of attorneys' fees was a fair one. Accordingly. we affirm the district court's ruling on the original request for attorneys' fees. However, because there is no indication that the district court considered Williams' supplemental motion in reaching its determination, we remand to the district court for a sole consideration of that motion.

F. The punitive damage award.

The jury awarded Williams $40,000.00 in compensatory damages and $60,000.00 in punitive damages. On the basis of *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the district court set aside the punitive damage award. Williams argues that this action was erroneous because the City failed to object to the punitive damage instruction during conference, and thus has waived the right to object to the award on appeal. *See Fed. R. Civ. P.* 51. We disagree.

The Supreme Court has held clearly that municipalities are immune from punitive damages under § 1983. *Newport,* 453 U.S. at 271. The Court reached this conclusion in *Newport* even though the city had failed to object to the punitive damages instruction. *Id.* at 253. We recognize that since *Newport* some courts have held that a city waives the right to object to a punitive damage award on appeal if it failed to do so at trial. *See Barnett v. Housing Auth.,* 707 F.2d 1571, 1581 (11th Cir. 1983); *Black,* 662 F.2d at 184 n.1. We disagree with the positions taken by these courts. We hold that, under *Newport,* it would have been an error, as a matter of law, if the district court had failed to set aside the punitive damages award. *See Hart,* 720 F.2d at 1444.

In conclusion we affirm the judgment on the verdict, but remand for the trial court's consideration of the supplemental motion for attorneys' fees submitted by Williams.

McMILLIAN, Circuit Judge, dissenting.

I respectfully dissent. I believe that the majority has lost sight of the requirement that, in order to impose

§ 1983 liability upon a city, a *policy* or *custom* of the city must be the cause of the constitutional violation. I believe that a fair reading of *Monell v. Department of Social Services,* 436 U.S. 658 (1978), dictates the conclusion in the present case that Butler's act of terminating Williams cannot alone subject the city to § 1983 liability.

As the majority noted, the Supreme Court held in *Monell* that local governments can be sued directly under 42 U.S.C. § 1983 where "the action that is alleged to be unconstitutional implements or executes a governmental policy statement or custom." *Id.* at 690-91. My disagreement with the majority lies in its interpretation of the following critical and oft-cited sentence from *Monell:* "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. I do not read the Court's words here, as the majority apparently does, to declare that any act of a city official to whom the city gave the discretion and final say-so to take such action, automatically becomes city policy, no matter how aberrant or personally motivated such action may be.

I fully agree with the majority that city policy or custom may, under certain circumstances, be made by individual officials, but I believe that the focus must always be whether the injury-inflicting act was a city policy or custom. Thus, it is actions taken by officials pursuant to delegated *policymaking* authority, as opposed to mere decisionmaking authority, that can subject the city to § 1983 liability.

In the present case, there was no evidence that Butler was delegated authority to set city personnel policy. Nor was it alleged that termination of employees who testified before a grand jury about their supervisors' alleged misconduct was a city custom.[1] The evidence only established that Butler had discretion to hire and fire his own personal staff and that termination of Williams was the result of a personal vendetta and not the result of a decision made on behalf of the city. I conclude that under the particular facts of this case, § 1983 liability cannot be imposed on the city purely on the basis of Butler's act.

I recognize that other circuits have adopted the strict "final authority" approach which the majority follows today.[2] Recently, however, as the majority notes, the Fifth Circuit has rejected this formula in *Bennett v. City of Slidell,* 728 F.2d 762 (5th Cir. 1984) (banc). The court there stressed that under *Monell,* a city's § 1983 liability "must rest on official policy, meaning the city government's policy and not the policy of an individual official." *Id.* at 769. The court went on to explain:

> The policy is that of the city, however, where it is made by an official under the authority to do so given by the governing authority. Hence culpable policy is

---

[1] I believe that the majority incorrectly analyzed the "custom" element of *Monell.* The question is not whether Butler "customarily" hired and fired his own staff, but whether the constitutional injury-inflicting act, i.e., firing an employee in violation of her first amendment rights, was a city custom.

[2] I am somewhat troubled by the fact that the source of this reading of *Monell* appears to be a law review article rather than sound, independent judicial reasoning. More important, of course, is my belief that this theory represents a misreading of *Monell* and, in this case leads to an erroneous result.

> attributable to the governing body of the city where the policy is made by an official to whom the governing body had given policymaking authority .... [T]he delegation of policymaking authority requires more than a showing of mere discretion or decisionmaking authority on the part of the delagatee.

Id. See also Losch v. Borough of Parkesburg, 736 F.2d 903, 910-11 (3d Cir. 1984) (borough not liable under § 1983 for police chief's unconstitutional misuse of criminal process by initiation of criminal charges against plaintiff without probable cause for reasons of personal animosity even if police chief were final authority with regard to police activities); *Thomas v. Sams*, 734 F.2d 185, 192-93 (5th Cir. 1984) (city liable for mayor's causing plaintiff's arrest without probable cause to prevent plaintiff's interference with construction of sewer line because city entrusted to mayor complete policymaking authority for all aspects of completing sewer line), *reh'g denied*, No. 82-2359 (Sept. 17, 1984). I believe this is the correct analysis to apply and would reverse the district court's judgment against the city in the present case.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

Debbie WILLIAMS and Linda Stanley,
Plaintiffs/Appellees Cross-Appellants.

v.

William R. BUTLER, Defendant,

v.

CITY OF LITTLE ROCK, ARKANSAS,
Third Party Defendant
Appellant/Cross-Appellee.

Nos. 83-2534, 83-2641

United States Court of Appeals,
Eighth Circuit.

Submitted April 30, 1985.

Decided May 13, 1985.

Appeal from the United States District Court for the Eastern District of Arkansas; William R. Overton, U.S.D.C. Judge.

Thomas Carpenter, Little Rock, Ark., for third party defendant appellant, cross-appellee.

Philip Kaplan, Little Rock, Ark., for plaintiffs, appellees, cross-appellants.

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG and BOWMAN, Circuit Judges, en banc.

ORDER

The district court's decision is affirmed by an equally divided court. Chief Judge Lay, and Judges Floyd R.

Gibson, Heaney, Bright, and Arnold vote to affirm the district court's decision. Judges Ross, McMillian, John R. Gibson, Fagg, and Bowman vote to reverse the district court's decision.

Appellee Williams, request for attorney fees is granted, with the following modification. Because appellee did not prevail on the punitive damages issue, the cost for services rendered will be reduced ten-percent to $8,055.00. The appellee's request for expenses in the amount of $1,068.79 is granted. Thus, the total award for fees and expenses allowed by the court is $9,123.79.

(2)

No. 85-249

Supreme Court, U.S.
FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

CITY OF LITTLE ROCK,

Petitioner,

vs.

DEBBIE WILLIAMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether a single isolated unconstitutional firing of a court clerk by a municipal judge possessing authority to hire and fire his employees establishes an official policy, custom, or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. § 1983.

TABLE OF CONTENTS

	Pages
Question Presented	i
Table of Authorities	iii
Opinion Below	2
Jurisdiction	2
Reasons for Denying the Writ	2
Statement of the Case	3
Statutory Provisions Involved	4
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Pages

Anderson v. City of Bessemer City, — U.S. —, 105 S.Ct. 2d 1504 (1985) 6

Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984) 7, 8

Bennett v. City of Slidell, 735 F.2d 861 (5th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 3476 (1985) 7

Black v. Stephens, 662 F.2d 181 (3rd Cir. 1981) 7

City of Oklahoma v. Tuttle, — U.S. —, 105 S.Ct. 2427 (1985) 4, 5, 8

Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980) 7

Losch v. Borough of Parkesburg, 736 F.2d 903 (3rd Cir. 1984) 6

Monell v. Department of Social Services, 438 U.S. 658 (1978) 5, 6, 8

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 3

Pembaur v. Cincinnati, No. 84-1160 ..... 4, 5

Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983) 7

Williams v. Butler, 746 F.2d 431 (8th Cir. 1984) 2

Williams v. Butler, 762 F.2d 73 (8th Cir. 1985) 2

STATUTES:

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 ..... 4, 9

No. 85-249

In The

Supreme Court of the United States

October Term, 1985

CITY OF LITTLE ROCK,

Petitioner,

vs.

DEBBIE WILLIAMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Debbie Williams respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The District Court did not issue an opinion in this matter. A copy of the judgment is included in the Appendix, page A-1 of the Petition. The panel decision of the United States Court of Appeals is also included in the Appendix, page A-9 of the Petition. *Williams v. Butler,* 746 F.2d 431 (8th Cir. 1984). The Court divided evenly on rehearing *en banc,* so no additional opinion was rendered. A copy of the May 13, 1985, order affirming the District Court is included in the Appendix, page A-36 of the petition. *Williams v. Butler,* 762 F.2d 73 (8th Cir. 1985).

———o———

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

———o———

REASONS FOR DENYING WRIT

Petitioner has failed to support his allegations that the Eighth Circuit Court of Appeals has (a) decided an important question of federal law which should be settled by this Court and (b) has decided a federal question in a way that conflicts with applicable decisions of this Court or the Courts of Appeals. The arguments advanced by petitioner are based on factual disputes, which do not warrant review, rather than legal disputes.

———o———

STATEMENT OF THE CASE

This is an action seeking redress for a city employee who was subject to retaliation for exposing municipal corruption. Prior to May, 1981, respondent Debbie Williams was employed as the Chief Clerk of the Municipal Court-Traffic Division of the City of Little Rock, Arkansas. In the course of her work, respondent observed William Butler, an elected municipal judge, deliberately destroy traffic tickets. Respondent reported the destruction of the tickets to the Police Department, and voluntarily testified before a grand jury about her observations. When Judge Butler subsequently learned that respondent had disclosed the destruction of the tickets, he dismissed her from her position as Chief Clerk.

Respondent brought this Section 1983 action against Judge Butler in his official capacity, alleging that the dismissal violated her First Amendment rights, and seeking actual and punitive damages. Judge Butler, in turn, filed a third-party complaint against the City of Little Rock, alleging that Butler had acted as an agent and on behalf of the city in firing respondent. A jury ruled in favor of respondent on her claim against Butler, awarding her $40,000 in compensatory damages and $60,000 in punitive damages. The district judge ruled in favor of Butler on his cross complaint, holding that Butler had acted as a city policy-making official in dismissing respondent from her job, and that the city was thus liable for any award against Butler. The district court set aside the jury award of punitive damages, holding that that award, since it would have to be paid by the city, was precluded by *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

On appeal the city conceded that the dismissal of respondent was unconstitutional. The City challenged the trial judge's factual finding that Butler was a policy-making official, and that he had acted within the scope of his policy-making authority in dismissing respondent. (Pet. App. 11-23) The court of appeals affirmed both findings. Judge McMillian dissented, arguing that Butler's conduct was, in fact, an "aberrant" action outside the scope of his policy-making authority. (Pet. App. 33) The decision of the panel was reheard *en banc*, and the decision of the district court was affirmed by an equally divided court. (Pet. App. 36-37)

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

ARGUMENT

1. This case, unlike *City of Oklahoma v. Tuttle*, — U.S. —, 105 S.Ct. 2427 (1985), and *Pembaur v. Cincinnati*, No. 84-1160, concerns the actions of a high-level municipal official whom both courts below found, and whom petitioner now acknowledges, was a policy-making official.

The district court held that Judge Butler exercised plenary policy-making authority over personnel matters.[1] The court of appeals affirmed that factual finding. (Pet. App. 13-14) Petitioners in this court concede that Butler was indeed a policy-making official within the meaning of *Monell v. Department of Social Services*, 438 U.S. 658 (1978).[2] Here, unlike *Tuttle* and *Pembaur*, there is an undisputed finding that the action of that policy-making official, in dismissing respondent, was itself an unconstitutional action, rather than merely a direct or indirect cause of a constitution violation. (Pet. 5; Pet. App. 11)

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[1]Pet. App. 3-4. Tr. 494:

"The Court: . . . I think the City turned . . . over to him, gave him the authority and responsibility for administering personnel decisions in the Little Rock Muncipal Court . . ."

"[Counsel for the City]: You're finding then that he set policy, is that the essence?"

"The Court: I'm finding that they completely turned it over to him, and he operated it exclusively. Yes."

[2]Petition, p. 5:

"Williams has successfully argued that Butler was granted policy-making authority by the City of Little Rock to make personnel decisions."

Petition, p. 10:

"The opinion in *Tuttle* ostensibly dealt only with lower level municipal employees. This case squarely addresses municipal liability for the acts of *policy-makers*." (Emphasis added.)

Petition, p. 10:

"The circuits are in disagreement about the exposure of municipalities to liability for the acts of *policy-makers*." (Emphasis added.)

The petition presents an essentially factual contention, asserting that Butler's conduct was an "aberrant" act, outside of his general policy-making authority. (Pet. 5) Petitioner advanced this factual argument in the district court, insisting that the evidence showed "that defendant Butler acted . . . completely outside of and beyond the scope of his authority."[3] The district judge found, however, that Butler "acted . . . within the authority delegated to him by the City" when he dismissed respondent. (Pet. App. 3) A majority of the court of appeals sustained that finding, holding Butler "was given . . . authority . . . to make the decision" at issue. (Pet. App. 20) Judge McMillian dissented, insisting that Butler's conduct was, in fact, an "aberrant action." (Pet. App. 33) The trial court's finding with regard to the scope of Butler's authority may be overturned only if clearly erroneous. *Anderson v. City of Bessemer City*, — U.S. —, 105 S.Ct. 2d 1504 (1985). A factual finding concurred in by both a trial court and court of appeals is not ordinarily reconsidered by this court.

2. This case involves no conflict among the circuits. Every court of appeals which has considered this issue has held that a municipality may be held liable under *Monell* for actions taken by officials exercising delegated

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[3]Post Trial Brief, p. 3. That argument was also advanced in opposition to Butler's proposed third party complaint, which asserted "the defendant acted out of personal spite, certainly not in accordance with any authority reposed in him by the City of Little Rock." Brief in Support of Third Party Defendant's Motion to Dismiss Third Party Complaint, paragraph 3.

policy-making authority. The Third,[4] Fourth,[5] and Fifth circuit decisions relied on by petitioner all expressly hold that municipal liability may be based on the exercise of *v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984) (*en banc*), for example, the Fifth Circuit reiterated its previous holdings that a "policy is that of the city . . . where it is made by an official under authority to do so given by the governing authority." 728 F.2d at 769. The Fifth Circuit in *Bennett* expressly reaffirmed its previous decision that actions by independent elected officials, such as Judge Butler in the instant case, are inherently delegated policy-making actions for which a city would be liable. 735 F.2d 861, 862 (5th Cir. 1984), (*en banc*), *cert. denied*, — U.S. —, 105 S.Ct. 3476 (1985), citing *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980).

The application of these principles to the disputed facts in any particular case may, of course, occasion disagreements. In *Bennett*, for example, the *en banc* court agreed unanimously on the applicable legal standard, 735 F.2d at 862, but was sharply divided regarding whether those standards warranted affirmance or reversal of the trial court finding of liability. *Id.* This court denied certiorari in *Bennett*, recognizing that such a fact-bound dispute did not raise any legal issue warranting review. — U.S. —, 105 S.Ct. 3476 (1984).

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[4]*Losch v. Borough of Parkesburg*, 736 F.2d 903, 911 (3rd Cir. 1984), indicated that it was important whether the official whose actions were challenged was such a "final authority." *Losch* relied in turn on an earlier Third Circuit decision, *Black v. Stephens*, 662 F.2d 181 (3rd Cir. 1981), which based a finding of municipal liability on the fact that the responsible official was "the final authority in charge of the police department." 662 F.2d at 191.

[5]*Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983) ("when an official has final authority in a matter involving the selection of goals, his choices represent policy").

The decision of the Eighth Circuit in the instant case did not, as petitioner implies, adopt any *per se* rule that all actions of policy-making officials give rise to liability under *Monell,* regardless of whether those actions are within the scope of the delegated policy-making authority. On the contrary, the panel below expressly refused to "speculate beyond the precise factual situation in this case" (Pet. App. 20), and carefully distinguished a case such as *Bennett* involving "an apparent aberrant act." (*Id.* at 17) The court below acknowledged that the exact limits of an official's policy-making authority would be "difficult . . . to articulate" (*Id.* at 21 n.10), and that not every discretionary act by a public official was *ipso facto* a policy decision. (*Id.*) The majority indicated it had "no quarrel" with the legal standard proposed by Judge McMillian's dissent, and disagreed only about the sufficiency of the evidence to satisfy that standard. (*Id.*) Such essentially factual disputes do not warrant review by this court.

3. Petitioner renews the "unlikely or extravagant" argument rejected in *Tuttle* that *Monell* does not impose liability for injuries occasioned by a single application of proven city policy. — U.S. —, 105 S.Ct. at 2441. (Brennan, Jr., concurring) The plurality opinion in *Tuttle* emphasized that "it requires only one application of a policy . . . to satisfy fully *Monell's* requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy." — U.S. —, 105 S.Ct. at 2436. The concurring opinion joined by three members of the court in *Tuttle* reached the same conclusion:

> A rule that the city should be entitled to its first constitutional violation without incurring liability . . . would be a legal anomoly, unsupported by the legislative history or policies underlying § 1983. A § 1983 cause of action is as available for the first victim of a policy or custom . . . as it is for the second and subsequent victims.

— U.S. —, 105 S.Ct. at 2440, 2441.

There may, of course, be cases in which a genuine dispute exists either with regard to whether an official had policy-making authority, or as to the actual actions or motives of that official. In such a situation a pattern of activity might be of evidentiary importance. In the instant case, however, both lower courts found, and petitioner acknowledges, that Butler was, in fact, a policy-making official, and that his actions were unconstitutional.

———o———

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 85-249

In The

Supreme Court of the United States

October Term, 1985

CITY OF LITTLE ROCK,

Petitioner,

vs.

DEBBIE WILLIAMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a single isolated unconstitutional firing of a court clerk by a municipal judge possessing authority to hire and fire his employees establishes an official policy, custom, or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. § 1983.

TABLE OF CONTENTS

	Pages
Question Presented	i
Table of Authorities	iii
Opinion Below	2
Jurisdiction	2
Reasons for Granting the Writ	2
Statement of the Case	3
Statutory Provisions Involved	3
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

	Pages
Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984)	5
Brown v. Reardon, 770 F.2d 896, 901 (10th Cir. 1985)	5
Burkhart v. Randles, 746 F.2d 1196, 1202 (6th Cir. 1985)	5
City of Oklahoma v. Tuttle, — U.S. —, 105 S.Ct. 2427 (1985)	6
Monell v. Department of Social Services, 436 U.S. 658 (1978)	6
Pembaur v. Cincinnati, 746 F.2d 337 (6th Cir. 1984), *cert. granted*, 105 S.Ct. 3475 (1985)	3, 4, 5, 6, 7
Polk v. Dodson County, 454 U.S. 312 (1981)	6
Turpin v. Mailet, 619 F.2d 196 (2nd Cir.), *cert. denied*, 449 U.S. 1016 (1980)	7
Williams v. Butler, 746 F.2d 431 (8th Cir. 1984)	2, 5, 6
Williams v. Butler, 762 F.2d (8th Cir. 1985)	2

STATUTES:

Ark. Stat. Ann. § 22-701	4
Ark. Stat. Ann. § 22-704.1 (Repl. 1962)	4
Ark. Stat. Ann. § 22-713	4
Ark. Stat. Ann. § 22-713.1 (Repl. 1985)	4
S.Ct.R.17.1(a)	2
28 U.S.C. § 1254(1)	2
42 U.S.C. § 1983	2, 3, 4, 6, 7

No. 85-249

In The

Supreme Court of the United States

October Term, 1985

CITY OF LITTLE ROCK,

Petitioner,

vs.

DEBBIE WILLIAMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner City of Little Rock [hereafter City] respectfully requests that this Court overlook the inaccuracies of Respondent's Brief in Opposition, and grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The District Court did not issue an opinion in this matter. A copy of the judgment is included in the appendix of the Petition (A-1). The panel decision of the United States Court of Appeals is also included in the Appendix of the Petition (A-9). *Williams v. Butler*, 746 F.2d 431 (8th Cir. 1984). The Court divided evenly on rehearing *en banc*, so no additional opinion was rendered. A copy of the May 13, 1985, order affirming the District Court is included in the Appendix of the Petition (A-36). *Williams v. Butler*, 762 F.2d (8th Cir. 1985).

———o———

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

———o———

REASONS FOR GRANTING THE WRIT

There is tremendous confusion among the federal circuit courts of appeal as to what constitutes a policy, custom or practice by a municipality sufficient to render a municipality liable for damages pursuant to 42 U.S.C. § 1983. The City reiterates that this Court should grant this writ in order to resolve this conflict. S.Ct.R. 17.1(a).

———o———

STATEMENT OF THE CASE

The City reaffirms its original Statement of the Case.

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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ARGUMENT IN REPLY

(The City is numbering the paragraphs in this Reply Brief to correspond with the numbering in Williams' Brief in Opposition).

1. Williams erroneously asserts that this case is totally unlike *Pembaur v. Cincinnati,* 746 F.2d 337 (6th Cir. 1984), *cert. granted,* 105 S.Ct. 3475 (1985), because *Pembaur* does not involve a high level municipal official. Williams has evidently failed to read *Pembaur.*

The question in *Pembaur* is whether a single, discreet decision by a *policymaking* official constitutes governmental policy for purposes of liability pursuant to 42 U.S.C. § 1983. An extremely similar issue is presented here. The

officials in *Pembaur* are the elected County Prosecutor and the elected County Sheriff. The official here is the elected municipal judge [hereafter "Judge Butler"].

In both cases the "authority" granted the relevant officials is based upon state statutes. *Pembaur*, 746 F.2d at 341; *see also* Ark. Stat. Ann. §§ 22-701; -704.1 (Repl. 1962); -713; -713.1 (Repl. 1985). To be sure, in Arkansas a municipality is virtually helpless to deny a municipal judge the authority to hire the clerks of his choice.

Hence, even though the City Board of Directors permitted Judge Butler to hire and fire his clerks, it effectively lacked authority to do otherwise. In any event, it never granted him the authority to hire and fire his clerks in an unconstitutional manner. The unconstitutional firing in this case was an aberrant act that cannot be deemed to constitute an officially promulgated city policy.

The precise issue for certiorari is a legal question—i.e., does one aberrant act constitute an official municipal policy for purposes of liability pursuant to 42 U.S.C. § 1983? Williams' characterization of this question as a factual issue is both misleading and inaccurate.

The District Court ruled as a matter of law that this aberrant act constituted an officially promulgated municipal policy. (R. 494) The divided Eighth Circuit panel affirmed the District Court. The vacation of the panel decision by the *en banc* rehearing effectively reinstituted the District Court's legal ruling.

At the very least this case is exactly like *Pembaur* and should be held in abeyance pending a decision in that case. As noted below, because of the intentional nature of Judge Butler's misconduct, as opposed to the discretionary con-

duct in *Pembaur*, this case has an added element that requires direct plenary review by this Court.

2. Williams' assertion that there is no conflict among the Circuits on the issues involved in this case ignores reality. [See Respondent's Brief at 6]. The City notes initially that Williams has totally failed to address the direct conflict between the Eighth and the Seventh Circuits. *Compare, Williams v. Butler,* 746 F.2d 431 (8th Cir. 1985) with *Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir. 1984) (intentional participation in a single conspiracy by an elected prosecutor held not the basis for municipal liability on a policy theory).

Further, *Williams* is in direct conflict with the Tenth Circuit by holding that one First Amendment violation is sufficient to establish a municipal policy. *Brown v. Reardon,* 770 F.2d 896, 901 (10th Cir. 1985) (one instance of illegal termination for failure to make a political contribution does not establish a municipal policy upon which to base municipal liability); *see also, Burkhart v. Randles,* 764 F.2d 1196, 1202 (6th Cir. 1985) (because of a *persistent* practice of First Amendment violations a county policy is established).

The cases cited in the initial petition have not been repeated here. But, it is clear that the Circuits are hopelessly in conflict on the issue of whether one act is sufficient to establish a municipal policy. This case provides the Court the opportunity to render a definitive answer to this question.

3. Williams finally suggests that this Court has ruled that one act can establish a municipal policy, custom or practice. [See Brief in Opposition at 8] The Court has not

answered that question. *City of Oklahoma v. Tuttle,* — U.S. —, 105 S.Ct. 2427 (1985), left that question open because an error in jury instructions made it unnecessary to decide the issue.

Even so, as this Court noted in *Polk v. Dodson County,* 454 U.S. 312 (1981), the official policy must be the "moving force" behind the constitutional tort. Here the moving force behind the tort was one man's abuse of power and not a municipal policy as Williams would like the Court to believe.

An aberrant act should not be held to establish official government policy. Three Circuits hold that it can. Three Circuits hold otherwise. [See Petition at 5-9]. This Court must resolve this conflict.

4. In *Pembaur* the trial court refused to base municipal liability on one act that was a matter of statutorily based discretion apparently made in good faith by a deputy prosecuting attorney and a deputy sheriff. In *Williams* the one act is a matter of statutorily based discretion being improperly exercised in a personal vendetta. In effect, Wiliams seeks to establish a *respondeat superior* basis of municipal liability. Because this Court has clearly held that *respondeat superior* is never a basis for § 1983 municipal liability, this Petition should be granted in order to extend that ruling to aberrant acts. *See Monell v. Department of Social Services,* 436 U.S. 658 (1978).

The City is being held liable, in essence, because of Judge Butler's intentional constitutional tort. This case will give this Court the opportunity to answer now whether municipalities can be held liable for acts of personal vendetta in the absence of ratification of such acts. *See*

Turpin v. Mailet, 619 F.2d 196 (2nd Cir.), *cert. denied*, 449 U.S. 1016 (1980).

CONCLUSION

The City reasserts its belief that this case should be granted review by the Court. At a minimum the Court should hold this matter in abeyance pending its decision in *Pembaur*. However, because of the added aspect of intentional misconduct for which there has been no ratification by the municipality, this Court should grant review and determine if such activity is ever the basis for municipal liability pursuant to 42 U.S.C. § 1983.

Respectfully submitted,

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